PUBLIC PROSECUTOR

v.

MICHAEL ANAYO AKABOGU

HIGH COURT MALAYA, PENANG
TUAN JEFFREY TAN JC
[CRIMINAL CASE NO. 47-4-91]
9 FEBRUARY 1995

EVIDENCE: *Statements recorded under s. 112 Criminal Procedure Code - Statements of Thai nationals whose attendance could not be secured - Admissibility of statements during trial - Conditions to be satisfied - Evidence Act 1950, s. 32(1) - Whether provisos (i) and (j) of s. 32(1) to be read conjunctively or disjunctively.*

The accused was tried for an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980). The facts showed that in the course of their investigation the police had recorded from four Thai nationals statements under s. 112 Criminal Procedure Code. It subsequently turned out that the police had not been able to secure the attendance of these witnesses for the accused's trial, and that being the case, the prosecution, during the trial, applied to the Court for admission of the statements under s. 32(1)(i) of the Evidence Act 1950. The Deputy Public Prosecutor submitted that the statements were made in the course and for the purpose of an investigation into an offence allegedly committed by the accused, and as such, had fully met the conditions for admission under s. 32(1)(i). The defence on the contrary contended that the conditions had not been satisfied as the statements were not made by public officers in the discharge of their duty and therefore had not complied with the requirement of proviso (j) to s. 32(1). As there appeared to be a controversy, both the prosecution and the defence applied for a ruling as to whether s. 32(1)(i) and s. 32(1)(j) were to be read:

1. conjunctively, in which case admissibility would be determined on the pre-conditions to s. 32(1); or,

2. disjunctively, in which case the statements in question would not be admissible.

Held:

[1] Sub-sections 32(1)(i) and (j) ought to be read conjunctively and not disjunctively. The sub-sections are conjoined by the word "and" in between them, which word was conspiciously absent in the provisions of s. 32(a) to (h). Brought in together, the intention of the legislature was therefore to bind the two sub-sections. They were in fact specifically inserted as a joint package to be read conjunctively. That this is so is fortified by the provision of s. 32(2) which provides that the two subsections shall apply only to criminal proceedings, quite unlike the rest of the provision of s. 32 which apply to all proceedings.

[2] A disjunctive reading of s. 32(1)(i) will be too great a breach of, and an unacceptable inroad to the hearsay rule. Reading ss. 32(1)(i) and (j) disjunctively would bear out ramifications which could be unthinkable. Among the repercussions would be that a conviction, even if based on recorded statements alone, would be beyond reproach if the investigating officer had declared that none of the material witnesses could be secured without an inordinate amount of delay or expense.

[3] Conjoined by the word "and", s. 32(1)(i) must be read together with s. 32(1)(j). In the circumstances the statements under s. 32(1)(i) must be one "*where the statement was made*

by a public officer in the course of his duties". The four statements here do not come under this category and the same, therefore, cannot be admitted into evidence.

[Application to admit statements refused. Accused acquitted and discharged without defence being called]

Cases referred to:
Sim Tiew Bee v. PP [1973] 2 MLJ 200 ***(refd)***
PP v. Goh Kim Looi [1994] 2 CLJ 809 ***(refd)***
PP v. Mohd. Jamil [1993] AMR 45-32 ***(refd)***

Legislations referred to:
Criminal Procedure Code, s. 112
Dangerous Drug Act 1952 Revised 1980 ss. 39B(1) (a), 39B (2)
Evidence Act 1950
ss. 32(1), (i), (2), (a), (h), 31A, 78A, 90A, 90B, 90C

Other source referred to:
Sarkar On Evidence 1993 Edn., p. 560

For the public prosecutor - Ishak bin Mohd. Yusoff (Ahmad Fairuz bin Zainol Abidin with him) DPP
For the accused - Karpal Singh (Jagdeep Singh Deo with him) M/s. Karpal Singh & Co.

JUDGMENT

Jeffrey Tan JC:

The accused was tried on the following charge:

> Bahawa kamu pada 14 November 1990, pada jam lebih kurang 6.30 petang di International Department Lounge Lapangan Terbang Antarabangsa Bayan Lepas, di dalam daerah Balik Pulau, di dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya, iaitu 1,074.4 gram heroin dan oleh itu kamu telah melakukan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (semakan 1980) dan boleh dihukum dibawah s. 39B(2) Akta yang sama.

At the close of the prosecution's case the accused was acquitted and discharged.

During the prosecution's case, the prosecution applied under s. 32(1)(i) of the Evidence Act 1950 to be admitted four (4) statements recorded from 4 Thai nationals under s. 112 of the Criminal Procedure Code, whose attendance could not be secured to testify at this trial.

In his application, the learned DPP asserted that the statements were made in the course of and for the purpose of the investigation into the alleged offence committed by the accused and met as such with the conditions for admission under s. 32(1)(i) of the Evidence Act 1950.

Before 16 July 1993, s. 32 dealt with the admissibility of statements of relevant facts made by persons who could not be called as witnesses in one of the four following circumstances;

(i) if a person is dead;

(ii) if a person cannot be found;

(iii) a person who has become incapable of giving evidence; or

(iv) a person whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable (see *Sim Tiew Bee v. PP* [1973] 2 MLJ 200) and if it falls under one of the 8 cases specifically set out in ss. 32(1)(a) to 32(1)(h).

With ss. 32(1)(i), 32(1)(j) and 32(2) that read as follows:

> 32(1)(i) When the statement was made in the course of, or for the purpose of an investigation or inquiry into an offence under or by virtue of any written law; and
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> 32(1)(j) Where the statement was made by a public officer in the discharge of his duties.
>
> 32(2) The provisions of para. (i) and (j) of subsection (1) shall apply only in relation to a criminal proceeding;

It now appears that s. 32 provides for the admissibility of statements of persons who cannot be called as witnesses in one of any 4 circumstances and if it falls within 10 cases (with the insertion of ss. 32(1)(i) and 32(1)(j)), and the statements recorded under s. 112 portend to fall under the 9 case that is ss. 32(1)(i).

In urging its admission, the learned DPP cited the recent decisions of *PP v. Goh Kim Looi* [1994] 2 CLJ 809 where a s. 112 statement recorded from a civilian was admitted under s. 32(1)(i), and *PP v. Mohd. Jamil* [1993] AMR 45-32 where a similar statement was accepted as evidence although the Court with misgivings to its credit worthiness placed no reliance on it.

The defence however contended that the conditions to s. 32(1) were not satisfied, as the witnesses could be contacted but insufficient attempts were made to contact them and even by then it was far too late. The defence further contended that the statements were not admissible as they were not made by public officers in the discharge of their duty as required by s. 32(1)(j).

On the controversy the learned DPP and defence Counsel both applied for a ruling whether ss. 32(1)(i) and 32(1)(j) are to be read:

(a) conjunctively, in which case admissibility would be determined on the pre-conditions to 32(1), or,

(b) disjunctively, in which case the statements would not be admissible.

Sub-sections 32(1)(i) and 32(1)(j), together with ss. 31A, 32(2), 78A, 90A, 90B and 90C of the Evidence Act 1950 are supplemental provisions inserted by Amendment Act 851 effective 16 July 1993.

As stated earlier, before 16 July 1993 s. 32 admitted statements of persons who could not be called as witnesses for one of the four circumstances, and within one of 8 clearly provided cases. Each of the 8 cases in ss. 32(1)(a) to 32(1)(h) is solitary and distinct and bears little similarity or resemblance to the others, discernible not just from the events but also by the absence of a conjunction after each case.

The law of evidence relating to criminal proceedings has always been proof beyond a reasonable doubt while in civil proceedings it is proof on a balance of probabilities. Those canons are both sacrosanct and inviolable, and any change even by statute to those hallowed standards of proof must be unmistakable, unambiguous and without and doubt whatsoever.

It is also basic that oral evidence must be direct or offend the hearsay rule and will not be admissible. However there are exceptions to the hearsay rule and s. 32 is one such exception as such is an inroad to the hearsay rule, but the rationale is clearly explained in *Sarkar On Evidence* (1993 Edn.) at p. 560, quoting from Wigmore:

> The purpose and reason of the hearsay rule is the keys to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the base untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security might be in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from risk of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of death of the declarant - so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exception.
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> The scope of the first principle may be briefly indicated by terming it the necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane or otherwise unavailable for the purpose of testing. The second principle which is termed circumstantial guarantee of trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to the statements tested in the conventional manner.
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> The following different classes of reasons underlie the exceptions: (a) where, the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification is formed, (b) where even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment would probably counteract its force, (c) where the statement was made under such circumstances of publicity that an error, if it had occurred, would probably have been detected and corrected.

According to the learned authors of Sarkar, the exceptions to the hearsay rules in para. (a) to s. 32(1) (dying declaration) rests on reason (b) (fear of divine punishment); those in paragraph (b) (entries in the course of business, etc.) rest on reasons (a), (b) and (c); that in paragraph (e) (declaration against pecuniary interest) rests on reason (a); those in paragraph (d)(opinion as to public right, etc.) rest on (a),(b) and (c); those in paragraphs (c) and (f) (declarations about pedigree) rest on (a) and (c); and those in s. 32(h)(expressions of feelings) rest on reason (a).

The Evidence Act 1950 is the *vade-mecum* for all proceedings, but certain provisions apply only to civil proceedings while others are peculiar to criminal trials. However there are provisions such as s. 32 (pre-amendment) applying equally to civil as well as criminal proceedings.

While ss. 32(1)(a) to 32(1)(h) relaxed the hearsay rule for both civil and criminal proceedings, most intriguingly the provisions of 32(1)(i) and 32(1)(j) apply only to criminal proceedings. However ss. 32(1)(i) and 32(1)(j) were specifically grafted onto s. 32 and was therefore intended to fall within the rationale as explained in *Sarkar On Evidence (ibid)*. However, the reasons behind these two amendments are not discernible and indeed the learned Judge in *PP v. Mohd Jamil (ibid)* expressed his dilemma in placing ss. 32(1)(i) and 32(1)(j) to any of the 3 classes of reasons underlining s. 32.

Reading ss. 32(1)(i) and 32(1)(j) disjunctively, the ramifications could even be unthinkable as seen from the following not improbable scenario;

(a) Statements are recorded from civilians (including civilian complainants) ostensibly in the course of and for the purpose of an investigation,

(b) One of the 4 pre-conditions for admission being an attendance which could not be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, statements are recorded from persons known at the time of recording would be difficult to be procured or even intended could not be procured.

(c) Those statements are highly incriminatory of an accused.

(d) Those statements are then tendered and admitted and the accused is convicted without the incriminating statements being tested by cross-examination.

The weight and probative value to be given to declarants' statements would depend on the facts and circumstances of each case, but that is no safeguard against the abuse and misuse of s. 32(1)(i) if it is to take effect disjunctively. It can even be anticipated of a conviction quite beyond reproach on recorded statements alone tendered by an investigation officer declaring that none of his material witnesses could be secured without an inordinate amount of delay or expense.

A disjunctive reading of s. 32(1)(i) therefore could be too great a breach and an unacceptable inroad to the hearsay rule. It is trite that penal provisions are to be narrowly construed; if arguably ss. 32(1)(i) and 32(1)(j) are not penal provisions, then undoubtedly they are provisions leading to proof in a criminal proceeding and conviction of an offence. The infirmities ambiguities and defects in the language of the inserted provisions must therefore be narrowly construed, but a disjunctive reading of the inserted sub-sections would give to it a wider interpretation that the natural meaning and impact of the language used.

Sub-sections 32(1)(i) and 32(1)(j) are conjoined by "and" between it, conspicuously absent in s. 32 (pre-amendment) in cases (a) to (h). Brought in together, the intention of the legislature was therefore to bind the two inserted sub-sections, which incidentally is the only szway it could be rationalised with reason (a) underlining s. 32.

There is reason further for this conjunctive construction. Each of the 8 cases in s. 32 (pre-amendment) is preceded by the word "when", the signature word to mark out the contingency, and ss. 32(1)(i) is similarly preceded by "when"; the singular exception being ss. 32(1)(j) preceded by "where".

The same word in the same provision must carry the same meaning, and if indeed it was intended for ss. 32(1)(i) and 32(1)(j) to be read disjunctively the legislature would surely have followed the proven format and language of s. 32 (pre-amendment), and s. 32(1)(j) would be preceded by "when" just as in the other 9 cases.

This departure from the proven term "when" denoting a separate case and the introduction of "and" between (i) and (j) singled out 32(1)(j) for special application. Sub-sections 32(1)(i) and 32(1)(j) were therefore specifically inserted as a joint package to be read conjunctively, an interpretation fortified by the provisions of s. 32(2) that it shall apply only to criminal proceedings, quite unlike the rest of the provisions of s. 32 that applies to all proceedings.

Conjoined by "and", 32(1)j) qualify that statements under 32(1)(i) must be one "where the statement was made by a public officer in the course of his duties".

The prosecution's application to have admitted those 4 statements was therefore refused.